STATE OF MICHIGAN

COURT OF APPEALS

JEAN LEDBETTER,

Plaintiff-Appellee,

v

CITY OF WARREN,

Defendant-Appellant,

and

KEVIN CLOUTIER,

Defendant.

UNPUBLISHED
October 31, 2006

No. 269758
Macomb Circuit Court
LC No. 2004-004716-NO

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant City of Warren appeals from the circuit court's denial of its motion for summary disposition premised on governmental immunity. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). As this Court explained in *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000):

> This Court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery.

As a general rule, a governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). One of the specific exceptions to this rule provides that a governmental agency that has jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). A highway is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks,

trailways, crosswalks, and culverts on the highway" but not alleys, trees, or utility poles. MCL 691.1401(e).

Plaintiff was walking on the sidewalk where it abutted an adjoining landowner's driveway. Because the apron of the driveway sank, there was a slight gap between it and the top of the sidewalk. Plaintiff stepped on the edge of the sidewalk, lost her balance, and fell. Assuming, without deciding, that a height differential between the edge of a sidewalk and adjacent private property constitutes a defect in the sidewalk itself so as to bring the case within the highway exception, defendant was nonetheless entitled to summary disposition because plaintiff failed to rebut the inference of "reasonable repair."

It is undisputed that the height differential here is less than two inches. "A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." MCL 691.1402a(2). That the city engineer knew about the height differential and opined that it should be repaired is insufficient to rebut the inference of reasonable repair. Instead, this shows only that defendant had a different repair policy than the state's statutory policy, not that the alleged defect made the alleged failure to repair unreasonable. Accordingly, we conclude that the trial court erred in denying defendant's motion for summary disposition.

Reversed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette